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Via e-mail

John D. Hawke, Jr., Comptroller
Office of the Comptroller of the Currency
250 E Street, SW
Public Information Room, Mailstop 1-5
Washington, D.C. 20219

Attention: Docket No. 04-09

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, D.C. 20551

Attention: Docket No. R-1188

Re: Notice of Proposed Rulemaking
Fair Credit Reporting Medical Information Regulations

Dear Mr. Hawke and Ms. Johnson:

This letter is submitted on behalf of The Huntington National Bank ("Huntington")[1] in response to the Notice of Proposed Rulemaking with respect to medical information regulations proposed by the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration (all of the foregoing referred to herein as "Agencies") pursuant to section 411 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), which amended the Fair Credit Reporting Act ("FCRA").

[1] Huntington is a subsidiary of Huntington Bancshares Incorporated, which is a $31 billion regional financial holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington has more than 138 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 300 regional banking offices in Indiana, Kentucky, Michigan, Ohio and West Virginia. Huntington, along with its affiliated companies, also offers retail and commercial financial services online at www.huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of nearly 700 ATMs. Selected financial service activities are also conducted in other states including: Dealer Sales offices in Florida, Georgia, Tennessee, Pennsylvania and Arizona; Private Financial Group offices in Florida; and Mortgage Banking offices in Florida, Maryland and New Jersey. International banking services are made available through the headquarters office in Columbus and additional offices located in the Cayman Islands and Hong Kong.

Section 411 of the FACT Act is intended "to restrict the use of medical information for inappropriate purposes"[2] and thereby imposes a broad prohibition on a creditor's ability to obtain and use medical information in connection with a determination of a consumer's eligibility, or continued eligibility, for credit. However, section 411 also requires the Agencies to provide exceptions to this prohibition by issuing regulations that permit a creditor to obtain and use medical information as "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs." Section 411 additionally establishes certain restrictions on the sharing of medical information among affiliated companies. As a general matter, Huntington believes the proposed regulations are consistent with the congressional intent of section 411 while preserving the ability of creditors to obtain and use medical information in those circumstances when it is necessary and appropriate. We do, however, have certain comments which we believe the OCC and the Board should consider in connection with any final rule.

Scope of the Proposed Regulations

Our primary concern is that the Agencies have limited the scope of these proposed regulations only to the entities which are within the scope of their respective jurisdictions. Since these regulations provide the only exceptions from the broad prohibition against obtaining or using medical information in the credit context, creditors not directly subject to these regulations will be barred from obtaining or using medical information for any determination of eligibility, or continued eligibility, for credit. This limitation on the scope of the proposed regulations will, however, also affect the financial institutions that are covered by the proposed regulations, because covered institutions often originate loans through, or purchase loans or other extensions of credit from, non-covered creditors, such as mortgage brokers and correspondents or motor vehicle dealers. Thus, this narrower approach taken by the Agencies will adversely affect such lines of business conducted by the financial institutions that are covered by the Agencies' proposed rules.

For example, a bank's agreements with motor vehicle dealers or loan brokers may require dealers or brokers who originate loans for the bank to represent and warrant that the applicant has the capacity to contract. While the proposed regulations would exclude the consideration of age from being the use of medical information, any consideration of or inquiry into the competence of a borrower, other than on the basis of age, would appear to be completely prohibited by the dealer or broker, since the term 'medical information' is defined in section 411 to include "the past, present, or future physical, mental, or behavioral health or condition of an individual".[3] Thus the bank would be unable to rely on the party who has direct contact with the applicant to determine capacity to contract, creating more risk to the bank that its extension of credit may be unenforceable, and eliminating the broker or dealer as a source of indemnification for breach of representation or warranty, since it would be unreasonable for the bank to require the broker or dealer to provide a representation or warranty with respect to capacity to contract

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[2] 15 U.S.C. 1681b(g)(5)(A).
[3] 15 U.S.C. 1681a(i).

when the broker or dealer would be prohibited by law from any consideration of capacity to contract.

Furthermore, a motor vehicle dealer or mortgage broker would not be permitted to consider, or even know about, medical debt delinquency, or on the positive side, medical debt repayment, in an applicant's credit history with respect to any determination as to whether or not to extend credit to the applicant. If the bank as purchaser or direct lender obtained such information as permitted under the proposed regulations, the dealer or broker would be prohibited from obtaining such information from the bank, and thus the bank could not even tell the dealer or broker about such delinquency if it were, for example, a basis for denial of the application, or explain to the dealer or broker that other adverse information in an applicant's credit history may be offset by the applicant's repayment of medical debts.

In general, the proposed regulations set forth several circumstances under which it is appropriate and necessary for a creditor to use and consider medical information in connection with a determination of eligibility for credit, and yet under the Agencies' proposed regulations, only the financial institutions directly covered by the Agencies' proposed rules would be permitted to use and consider such information and engage in lines of business where use of such information is necessary.

This result is not at all required by section 411. To the contrary, section 411 is more appropriately read as requiring the Agencies to issue regulatory exceptions that cover all creditors who would otherwise be subject to the statutory restriction against obtaining and using medical information for credit purposes. The plain language of FCRA section 604(g)(5)(A), as amended by section 411, simply requires the Agencies to "prescribe regulations that permit transaction under paragraph (2)". This statute does not limit those regulations to the institutions within the Agencies' respective jurisdictions. Where the intent of Congress in the FCRA is to limit regulations to institutions within an agency's jurisdiction, Congress has done so explicitly. For example, just a few lines above the requirement to issue these regulations in section 604(g)(5)(A) is a provision authorizing the Agencies to issue other regulations in connection with the sharing of medical information with affiliates, and in that context the statute explicitly states that such other regulations are to be "with respect to any financial institution subject to the jurisdiction of such agency".[4]

The Agencies' approach in limiting these proposed regulations to the institutions within their respective jurisdictions, instead of making them applicable to all creditors, needlessly bars those other creditors from engaging in appropriate lines of business, and goes beyond that to prevent institutions who are within the Agencies' respective jurisdictions from using such creditors in necessary and appropriate ways to originate extensions of credit. This is contrary to the public policy of necessary and appropriate use of medical information in the credit context expressed in section 411, and thus we strongly urge the OCC and the Board to reconsider this approach and to extend the scope of these regulatory exceptions to all creditors.

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[4] 15 U.S.C. 1681b(g)(3)(C).

General Comments on Structure of the Proposed Regulations and Miscellaneous Provisions

We are supportive of the three-part approach taken in the proposed regulations: (i) first to limit the scope of the term 'eligibility, or continued eligibility, for credit' so that it does not include products, processes or functions that are not part of a credit eligibility determination and so that it is limited to consumer credit;[5] (ii) second to provide exceptions for medical information that is also financial information; and (iii) third to provide additional specific exceptions where use of any type of medical information is necessary or appropriate in connection with an extension of credit. One minor comment is with respect to the wording of the financial information exception in __.30(c)(1)(i). The list of items that the medical information is permitted to relate to could be construed to be exclusive, and thus we recommend adding to the end of that provision, the following: ". . . or other information of a type routinely used in credit eligibility determinations.'' This would cover items that may have been unintentionally omitted by the Agencies when drafting the list.

We are also supportive of the use of examples to explain the workings of the proposed regulations and of the statement in the proposed regulations that the examples are not exclusive and that compliance with an example provides a safe harbor for compliance with these rules. We believe the Agencies should retain the examples and this rule of construction with respect to them. We do have a minor comment on one of the examples, however. The example in section __.30(c)(2)(iii)(B) states that the bank would be in violation if a loan officer recommends denial of credit because the consumer had a particular disease, but the example does not go on to say that the bank then acted on that recommendation and in fact denied the application. Under the example, the bank would appear to be in violation even if the bank made the loan notwithstanding the loan officer's recommendation. We recommend that this example be revised to clarify that the bank actually denied the loan for the impermissible reason.

We are also supportive of the rule of construction in section __.30(b), which clarifies that a creditor would not obtain medical information in violation of the statutory prohibition if it receives such information without specifically requesting it and does not use it in connection with an extension of credit. This is an important safe harbor under the proposed regulations, because creditors should not be penalized for receiving medical information on an unsolicited basis. We believe it is better to address this matter as a rule of construction as the Agencies have done, rather than make it an exception to the general prohibition, because we believe this safe harbor would have broader applicability as a rule of construction.

Additionally, the Agencies request comment on how to treat the receipt of consumer reports containing coded medical information in accordance with FCRA section 604(g)(1)(C). We believe it would be best to exclude such consumer reports from the definition of 'medical information', because that appears to provide the broadest applicability for such exclusion, and because Congress, by providing the coding option to consumer reporting agencies, was already determining appropriate protections for medical information in that context, and we do not

[5] Limiting coverage to consumer credit is consistent with the general scope of the FCRA.

believe that Congress further intended the Agencies to impose additional restrictions with respect to such coded information.

Use of Medical Information in Connection With Debt Cancellation Products

We believe these proposed regulations are not sufficiently clear that it is permissible to obtain and use medical information in connection with offering and determining eligibility for debt cancellation products.[6] The definition of 'eligibility, or continued eligibility, for credit' in section __.30(a)(2)(i) of the proposed regulations includes not only qualification to receive credit, but also the terms upon which credit is offered. Since debt cancellation products are actually additional terms and provisions of an extension of credit, and are not—as distinguished from credit insurance—a separate product from the extension of credit itself, the concept of 'eligibility' would appear to include eligibility for terms and provisions of an extension of credit related to debt cancellation. Since debt cancellation products—like credit life and disability insurance—often require consideration of medical information as a condition of eligibility, it appears that, absent an express regulatory exception, the use of medical information in connection with offering a debt cancellation provision in an extension of credit may be prohibited, which would have the effect of prohibiting the product itself where consideration of medical information is a necessary condition of offering the product.

It appears from the exclusions to the definition of 'eligibility' set forth in section __.30(a)(2)(i) that the Agencies probably intended to permit the use of medical information in connection with offering debt cancellation products, because in section __.30(a)(2)(i)(B) "[a]ny determination of whether the provisions of a debt cancellation contract, debt suspension agreement . . . are triggered" is excluded from 'eligibility'. This exclusion must assume that use of medical information to determine qualification or fitness for obtaining a debt cancellation product in the first place is permissible, because otherwise there would be no product for which to determine whether or not coverage had been triggered. However, no such express statement is included in the exclusions listed in section __.30(a)(2)(i), or in the other exceptions in the proposed regulations.[7]

We think it would be best to resolve this problem by including a reference to debt cancellation in the exclusions from the definition of 'eligibility, or continued eligibility, for credit'. That would then parallel the treatment of credit insurance, and although debt cancellation is not insurance, medical information is used in connection with debt cancellation for the same kinds of risks as it is used with insurance products, and thus parallel treatment seems appropriate. Thus, we recommend that section __.30(a)(2)(i)(A) be revised to include a reference to debt cancellation as follows (new text underlined): "(A) The consumer's qualification or fitness to be offered employment, insurance products, <u>debt cancellation or debt suspension products,</u> or other non-credit products or services".

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[6] We intend references to debt cancellation products in this letter also to include debt suspension products.

[7] The reference to "non-credit products or services" in section __.30(a)(2)(i)(A) would not appear to be adequate, since debt cancellation is not a "non-credit" product or service.

Use of Medical Information to Determine Capacity to Contract

The exception in section __.30(d)(1)(i) permits the use of medical information "[t]o determine whether the use of a power of attorney or legal representative is necessary and appropriate". This appears to be the only exception pursuant to which a creditor could use medical information to determine whether the consumer was competent to enter into a contract, and it would be helpful if the wording of this exception were clearer about that. We recommend that this exception be revised as follows (new text underlined): 'To determine whether the consumer has the capacity to contract or whether the use of a power of attorney or legal representative is necessary and appropriate".

Thank you for consideration of these comments. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact the undersigned at 614-480-5760.

Sincerely,

Daniel W. Morton
Senior Vice President & Senior Counsel